SUPREME COURT, U. S.

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JOHN F. DAVIS, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 731

KENNETH R. JONES,
Petitioner,

vs.

THE STATE BOARD OF EDUCATION OF AND FOR THE STATE OF TENNESSEE, et al.,
Respondents.

RESPONDENTS' BRIEF

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Counter-Questions	2
Counter Statement of the Case	3
The F. A. C. Charges, Findings and the Evidence	5
Evidence	6
Argument	9
Counter-Question No. I	9
Counter-Question No. II	15
Case Holdings in School Cases	16
Conclusion	19
Certificate of Service	20

TABLE OF AUTHORITIES

Cases:

Aikens v. Wisconsin, 195 U. S. 194, 205, 206	13
Barker v. Hardaway, 399 F. 2d 638 (4th Cir. 1968)	19
Dennis v. United States, 341 U. S. 494 (1951)	13
Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir., 1961), cert denied, 368 U. S. 930	16
Due v. Florida A & M University, 233 F. Supp. 396 (1963)	4, 10
F. T. C. v. Cement Institute, 33 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948)	18
Goldberg v. Regents of University of California, 248 A. C. A. 1015, 57 Cal. Rptr. 463 (1967)	10, 11
Gompers v. Bucks Stove and Range Co., 221 U. S. 418	14

Knight v. State Board of Education, 200 F. Sup. 174.16, 17
Koblitz v. Western Reserve University, 21 Ohio C. C. 144 16
Louisville Gas and Electric Co. v. F. P. C., 129 F. 2d 126 (6th Cir. 1942), cert. denied, 318 U. S. 761, 63 S. Ct. 559, 87 L. Ed. 1133 16
Mackler v. Board of Education of City of Camden, 16 N. J. 362, 108 A. 2d 854 (1954) 18
Marcello v. Bonds, 349 U. S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 18
McAuliffe v. City of New Bedford, 155 Mass. 216, 220 12
Meehan v. Macy, et al., 392 F. 2d 822 .....11, 12
Morris v. Nowotny, Tex. Civ. App. (1959), 323 S. W. 2d 301, cert. den. 361 U. S. 889, 80 S. Ct. 164, 4 L. Ed. 2d 124 11
N. L. R. B. v. Prettyman, 117 F. 2d 786 (6th Cir. 1941) 16
Norton, et al. v. The Discipline Committee of East Tennessee State University, U. S. Ct. App. (6th Cir., Nov. 28, 1969) 13, 14, 18
Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624 16
Pangburn v. C. A. B., 311 F. 2d 349 (1st Cir. 1962).. 18
Schenck v. United States, 249 U. S. 47 (1919) 13
Shaughnessy v. United States, 349 U. S. 280, 75 S. Ct. 847, 99 L. Ed. 1074 18
State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S. W. 2d 822, cert. denied, 319 U. S. 748 .....16, 17
Tinker v. Des Moines Independent Community School District, 393 U. S. 503 14
Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967) 17, 18

Other Authorities:

2 Davis, Administrative Law, Sec. 13.02, 237-238 (1958) 18

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RESPONDENTS' BRIEF

OPINIONS BELOW

The opinions of the lower Court are reproduced verbatim in the joint Appendix filed in this case. The opinion of the District Court is found at pages 183 through 206 (also

reported in 279 F. Supp. 190), and the Court of Appeals opinion at pages 208 through 210 (also reported in 407 F. 2d 834).

JURISDICTION

Jurisdiction Is Admitted.

COUNTER-QUESTIONS

I

Whether the University Acted Arbitrarily and Capriciously in Suspending the Petitioner, or Whether It Acted With Procedural Fairness and Suspended the Petitioner for Acts of Misconduct That Were Calculated to Promote Unrest on the Campus, Bring About Disorder, Challenge Legitimate University Authority or Engage in Conduct Prohibited All Students.

II

Whether Petitioner Was Given Due Process as to: (a) Time for Adequate Preparation for His Hearing, and (b) Notice of Charges Against Him: and Whether or Not the Two Members of the Committee Who Gave Testimony Against Him Were Biased.[1]

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[1] Certiorari was granted only to this petitioner and disallowed as to the other two original petitioners. Respondents therefore, feel these last two questions have been pretermitted since they would have applied equally to the other two original petitioners.

COUNTER-STATEMENT OF THE CASE

Petitioner, Kenneth R. Jones, an Ohio resident, was "suspended" from the Tennessee State University at Nashville, Tennessee, for promoting unrest on the campus on different occasions by such actions as distributing literature for that purpose; for not being truthful when he appeared before the Discipline Committee in regard thereto; for violating the rules of conduct governing students at such University; and for failing to meet the minimum standards of propriety in conduct required at such University.

Members of the faculty, particularly Dr. J. A. Payne, Dean of Students, had talked with Jones throughout the school year. He had worked with him in an attempt to persuade him not to continue to deviate from the standards of conduct prescribed by the University (A. pp. 116-117). At the end of the school year, pursuant to long established practice, the Faculty Advisory Committee met and discussed the students that had, during that school year, been suggested for disciplinary action. Jones was among some seventy students that were, as a result of such conference, notified by letter that they were being considered for disciplinary action (A. p. 113). They were advised to appear and show cause for the conduct complained of in the letter. Prior to sending the letter, however, a telegram was sent to such students, advising them that they had not been cleared to enter the University for summer study and that a letter would follow.

Following notice from petitioner (and several other students[2]) the University arranged for a hearing, detailed

[2] Hearings were originally scheduled for five students. Charges were dismissed as to one, another was found to have graduated and had not applied for admission to graduate school. The three original petitioners, including the one before this Court, were indefinitely suspended.

the charges against him; permitted him to appear before the Committee with counsel and witnesses; to be a witness for himself; and to speak until he had nothing further to say.[3]

Following the suspension, this petitioner (and two others) brought suit in the United States District Court for Tennessee (MD), and following three days of hearing proof, the presiding judge of that Court, Judge William E. Miller, on January 18, 1968, entered an opinion in which, after thoroughly discussing all of the complaints, he dismissed the case ". . . on the merits" (A. p. 206). On appeal to the United States Circuit Court of Appeals, Sixth Circuit, that Court reviewed the proof and affirmed the District Court. In so doing, the Appellate Court said, in part:

> "We take special note of plaintiff's argument that they were expelled for activities which are protected by the First Amendment. This argument is clearly refuted by the record which is replete with substantial evidence to support plaintiffs' expulsion for conduct other than the type of activity which is entitled to constitutional protection."[4]

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[3] **Due v. Florida A & M University**, 233 F. Supp. 396 (1963).

[4] Reference is made to this specific finding because it is believed that this is perhaps the question that was of most concern to this Court when it granted certiorari in this case.

THE F. A. C. CHARGES, FINDINGS AND THE EVIDENCE

The specific charges made by the Faculty Advisory Committee against this petitioner was as follows:

> "You are charged with conduct unbefitting a University student in that during the school year you created a disturbance in the cafeteria located within Jane E. Elliott Hall. During that time a 'worm' which obviously had not been processed through the kitchen was said to have been found in some food served to one of your fellow students. Your actions on that occasion exemplify a disrespect for University authority.
>
> You are charged with distributing literature and soliciting students, all of which was designed to boycott the registration at the University for the Fall Quarter 1967. This occurred during the Summer of 1967.
>
> You are charged with having been recently arrested by the Nashville Metropolitan Police Department at Fortieth Avenue and Clifton Road upon a charge of disorderly conduct. Pursuant to that arrest, you were convicted and fined $50.00 by the Judge of the Metropolitan City Court."
>
> You are charged with continuous disrespect for University authority, all of which is a violation of Chapter 4, Student Handbook, 'Discipline and Honor', pages 17 and 18, and Chapter 3, 'Conduct', page 11."

During the hearing, the president of the University positively identified a leaflet signed by "SNCC", which advocated boycott of school registration as being one of the pieces of literature Jones distributed on the campus. He gave the president one copy personally and the president said he had about fifty copies at that time. A cafe-

teria worker at the University also positively identified this particular leaflet as being one she saw Jones passing out in the school cafeteria. Jones brazeningly denied this and it was a finding of the committee that he was not truthful in so doing. As a result, the F. A. C. Findings were:

> "We, the Committee, find that Mr. Jones has seized upon the opportunity on different occasions to promote unrest on the campus by such actions as distributing literature designed for that purpose. At the hearing he demonstrated his indifference to the truth by denying that he passed out such literature despite positive statements by cafeteria personnel and the President of the University that he had done so. We have no doubt that this student did not tell the truth when he appeared before us in this regard.
>
> After considering all of the matters before this Committee, we feel that Mr. Kenneth Jones has violated the rules of conduct governing students at this University to such an extent that he should be suspended for an indefinite period. We have found from the evidence presented that the actions of Mr. Jones did constitute violations of the University's regulations governing student conduct and behavior. Mr. Jones has not demonstrated his willingness to observe the minimum standards of propriety in conduct required here."

(A. pp. 30-31)

EVIDENCE

Mr. Jones admitted passing out certain other pieces of literature during this period, but he denied passing out the "boycott" literature. However, the F. A. C. found that he lied about this, and the District Court found the evidence sustained the F. A. C. findings of fact. There

was evidence that a considerable amount of leaflets were distributed during this period, and some were introduced as exhibits in the District Court. This was all done during a period of unrest on the campus.[5]

In addition to the factual finding concerning the "boycott" literature, it was admitted by Jones that he had been convicted of two charges and fined $50.00 in the Metropolitan Nashville City Court, of disorderly conduct.

Chapter 4 of the Student Handbook (A. p. 177) specifies certain things, or offenses, that require "Severe Discipline" (pp. 17-18, Handbook). One of these is: "Any act in violation of city, county, state or federal law." Another is: "Disrespect for University authority (ibid)."

Additionally, Dr. Payne testified that he had, during the school year, tried to dissuade Jones from continuing to defy standards of conduct prescribed by the University (A. pp. 116-117). As a result of all of these the F. A. C. found that:

> ". . . the actions of Mr. Jones did constitute violations of the University's regulations governing student conduct and behavior. Mr. Jones has not demonstrated his willingness to observe the minimum standards of propriety in conduct required here."
>
> (A. p. 31)

The District Court found facts, after hearing testimony for three days, to support the F. A. C. findings, and dismissed the complaint ". . . on the merits" (A. p. 206). The Sixth Circuit Court of Appeals found that the acts committed by "petitioner", as shown in the record, went

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[5] Shortly thereafter, the same summer, Stokley Carmichael appeared on the campus, and a riot ensued, which lasted several days.

beyond that protected by the First Amendment, and further that:

> "This argument is clearly refuted by the record which is replete with substantial evidence to support plaintiffs' expulsion for conduct other than the type of activity which is entitled to constitutional protection."
>
> (A. p. 210)

ARGUMENT

Respondents, having combined Petitioner's four questions into two counter-questions, would say:

Counter-Question I

(Questions 1 and 2 for Petitioner)

Basically, questions 1 and 2 raise the issue as to whether or not the findings of the F. A. C. are supported by substantial evidence, and whether or not this school disciplinary body acted arbitrarily and capriciously. Further, that even if the proof was substantial, and the F. A. C. acted with procedural fairness, whether the acts found to have been committed by petitioner were solely acts protected by the Constitution. The first question, stated by petitioner, charges the language which prescribes regulations for student conduct in the Student Handbook, with being vague and overbroad. Respondents would reply, first, to this, that this appeal is from the trial held in the U. S. District Court, at which time each petitioner admitted he knew the acts on which the disciplinary action was taken. The petitioner also, clearly, from the transcript of the F. A. C. hearings, was familiar with each charge against him and each act found to have been committed by him.

"Disrespect for University authority", and "Any act in violation of city, county, state or federal law," should not be so vague and overbroad as to confuse a college student. These specific acts, plus the act of distributing literature and soliciting students, all of which was designed to boycott the registration at the University for the Fall quarter, 1967, constituted the charges against the petitioner, which were the basis of the factual hearing and resultant findings. Judge Miller in his opinion (A. p. 195), said, concerning the vague and overbroad complaint:

> "The specifications of charges of September 14th were precise statements of the accusations against plaintiffs. They were actually more detailed than many indictments presented in courts of law."

Both at the F. A. C. hearings, and the District Court trial, it was obvious, from the record, that the petitioner was fully aware of all charges against him.

The United States District Court, in Florida, in **Due v. Florida A. & M. University**, 233 F. Supp. 396 (1963), held that where students were telephoned and asked to come to the campus and contact the Chairman of the Disciplinary Committee (comparable to A&I's F. A. C.) and were for the first time read the text of a letter which they had denied receiving, which charged them with having been convicted for contempt of court in the Circuit Court of Leon County, Florida, in violation of the rules and regulations of a student handbook, and were permitted to respond to the charge until they had no more to say, had not been denied due process. In that case, the hearing was informally held in the faculty lounge, one of the students was given about forty-five minutes and the other fifteen or twenty minutes to answer to this charge. They did not have counsel present, and they were not permitted to hear any testimony against them except the reading of the letter referred to. They were suspended indefinitely for violating the regulations of the student handbook. The United States District Court upheld the decision of the school officials in suspending the students and held the notice and hearing sufficient.

Further authority for University authority to suspend or otherwise discipline students, is found in the recent California case, **Goldberg v. Regents of University of California**, 248 A. C. A. 1015, 57 Ca. Rptr. 463 (1967). In this case, the students were expelled after being arrested for violating obscenity statutes and before a con-

viction thereon. The Court held that holding the hearings and subsequently dismissing the students before conviction in the courts did not deny them due process, since they were in violation of the rules and regulations of the University as set forth in the General Catalogue of the Berkeley Campus. This is equivalent to the Student Handbook at Tennessee A. & I. State University.

In a State supported university, where the student, through tuition-type fees, pays approximately ten percent of the cost, and the balance is borne by taxpayers generally,[6] how far is he authorized to go in his conduct to the detriment of school administration and the rights of other students seeking an education at such university? Does his constitutional umbrella have no leaks while he pushes others from its protection into inclement weather?

The Supreme Court of California, in the **Goldberg** case, supra, had this to say on the subject:

> "We hold that in this case, the University's disciplinary action was a proper exercise of its inherent general powers to maintain order on the campus, and to exclude therefrom those who are detrimental to its well being (**Morris v. Nowotny**, Tex. Civ. App. (1959), 323 S. W. 2d 301, cert. denied 361 U. S. 889, 80 S. Ct. 164, 4 L. Ed. 2d 124). Thus, for the purposes of this appeal, it is not necessary to discuss plaintiffs' contention that any particular regulation was unconstitutionally vague."

In the case of **Meehan v. Macy, et al.**, the United States Court of Appeals, District of Columbia,[7] in up-

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[6] This petitioner was not even a citizen of the State of Tennessee, but chose this university, and knew of the attendant restrictions.

[7] 392 F. 2d 822.

holding the dismissal of an employee under Civil Service for violating rules of employment, cited the oft-quoted ruling of Justice Holmes of Massachusetts:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[8]

Certainly a student in enrolling in a state supported university does so with an obligation to abide by reasonable restrictions imposed alike upon all students for the orderly administration of the University.

It has, in effect, been argued that since petitioner's appeal to the student body for a boycott of registration did not produce the results he sought, that it was harmless. Are the school administrators required to wait until the horse is out to close the barn door? Had he not been suspended that summer, who knows what activity petitioner would have engaged in, or the results, before the Fall quarter began. We do know that shortly after this rash of literature was passed out on the campus, that Stokley Carmichael appeared and a campus riot resulted.

In the **Meehan** case, supra, the Appeals Court said:

> "With mounting provision of increased and increasingly indispensable services rendered by Government employees, the public weal demands administration that is effective and disciplined, and **not beset by turmoil and anarchy.**" (Emphasis supplied.)

All over this nation today a small percent of students on our college campuses are completely disrupting the learning processes not only for themselves but for the vast majority who are there for an education, and often at great sacrifice to themselves and others.

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[8] **McAuliffe v. City of New Bedford**, 155 Mass. 216, 220.

In a recent decision[9] (Nov. 28, 1969) the United States Court of Appeals, Sixth Circuit, in another Tennessee case wherein students were suspended from a state university for handing out leaflets, upheld the action by the school authorities and in doing so, said:

> "It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud, and prevent it in its inception. This is authorized even in criminal cases.
>
> As well stated by Chief Justice Vinson, in Dennis v. United States, 341 U. S. 494, at page 509 (1951):
>
> > 'Obviously, the words cannot mean that before the Government may act, it must wait until the "putsch" is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.'
>
> "In **Schenck v. United States**, 249 U. S. 47, at 52 (1919), Mr. Justice Holmes said:
>
> > 'We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. **Aikens v. Wisconsin**, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shout-

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[9] **Norton, et al. v. The Discipline Committee of East Tennessee State University.**

> ing fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. **Gompers v. Bucks Stove and Range Co.**, 221 U. S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.' "

In the case of **Tinker v. Des Moines Independent Community School District**, 393 U. S. 503, Mr. Justice Fortas, speaking for the Court in the majority opinion, was careful to mention:

> "As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." Id. at 514.

In the present case, the Faculty Advisory Committee, with the concurrence of the President of the University, did forecast disturbances as a result of the threat of this boycott of registration, and they moved quickly to prevent it.

The case sub judice is similar to the **Norton** case, supra, also in regard to the action taken by the Committee. In both cases, the students were "suspended" and not "expelled." The Court, in commenting on this in **Norton**, said:

> "Finally, it should be emphasized that appellants were not expelled from the University, but were merely suspended. The difference between expulsion

and suspension was explained by Dr. Davis as follows:

> 'I continue to hear reference to the matter of expel or expulsion. We at no time even mentioned the word expel or expulsion.
> 'The plan of suspension is a restraint from enrollment which gives those of us who are concerned with administration of affairs time to reflect and to study what has happened. It also gives the student time to reflect and to study, and to appear before the committee then so that the committee and the student can, if possible, come to an agreement about future attendance.
> 'There is a difference in the meaning of suspension and expulsion' (159a).

"The District Judge, at the close of the hearing, suggested that the University give hearings on applications for reinstatements. The record does not reveal that any such applications were made. The students were apparently insistent that they had the right to do what they did and they are going to stand by it.
"In our judgment there is no basis for federal interference with the disciplinary procedures of the State University in this case.
"We agree with the District Court that the charges that the literature was false and inflammatory, was sufficiently definite."

Counter-Question II

(Questions 3 and 4 for Petitioner)

This question raises the issue of due process, as outlined under the stated question of this brief.

Respondents would point out that this petitioner was not treated differently from the other two original pe-

titioners in this regard, and since this Honorable Court rejected their petition for certiorari, we feel the Court has, to a degree at least, pretermitted this issue. However, Respondents would make this brief reply:

In the case at bar, the petitioner, together with the other two original petitioners, were given a formal hearing following at least three notices, charges in writing were given them, they were permitted to have an attorney present, testimony was introduced in their presence, they were given an opportunity to testify and ask questions of their accusers. Further, they were allowed to speak "until they had nothing further to say." The weight of authority is to the effect that no formal hearing is required; that is, that the hearing need not be conducted with all the formality of a trial in court, even where a statute requires a hearing. 58 A. L. R. 2d 906-907, citing: **Koblitz v. Western Reserve University**, 21 Ohio C. C. 144; **State ex rel. Sherman v. Hyman**, 180 Tenn. 99, 171 S. W. 2d 822, **cert. denied**, 319 U. S. 748; and others. The holdings are also clear that no particular form of procedure is required to constitute due process in administrative hearings. **Louisville Gas and Electric Co. v. F. P. C.**, 129 F. 2d 126 (6th Cir. 1942), **cert. denied**, 318 U. S. 761, 63 S. Ct. 559, 87 L. Ed. 1133, and **N. L. R. B. v. Prettyman**, 117 F. 2d 786 (6th Cir., 1941). It is equally clear that the stage of the proceedings wherein the hearing is held is not important. **Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor**, 312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624.

Case Holdings in School Cases

The petitioner has relied heavily on the case of **Knight v. State Board of Education**, 200 F. Supp. 174 (M. D. Tenn. 1961), and **Dixon v. Alabama State Board of Education**, 294 F. 2d 150 (5th Cir., 1961), **cert. denied**, 368

U. S. 930, wherein it was held that fair notice and an opportunity for hearing were required. However, in neither of these cases were the students given any kind of a hearing before expulsion.

In **Sherman v. Hyman**, supra, certain medical students at the University of Tennessee were afforded hearings before a special board of students and then a faculty committee and a special committee of the board of trustees. At each stage, they were informed of the substance of the testimony against them and permitted to testify and present evidence in rebuttal. Certain guidelines were set out in connection with the procedure followed. The **Knight** case, supra, cited this case as a guideline for such hearings, and effectively upheld such procedure. The petitioner in the case at bar was given everything suggested in **Sherman v. Hyman**, supra, plus communication over a period of time relative to the charges and was allowed counsel. He also met his accusers "face to face" and was permitted to cross-examine them. As indicated earlier, petitioner was given notice over a considerable period of time, he was given specific charges before the hearing, he was granted a formal hearing in a hearing room at the University, he had counsel present, charges were enumerated, were testified to in the presence of petitioner who was privileged to cross-examine and testify for himself under direction of his counsel, and allowed to call witnesses on his behalf.

Petitioner further alleges that he was not given a fair hearing by the F. A. C. as a result of some two of the nine members testifying against him and continuing to sit on the Committee throughout the hearings and rendering of the decisions. To support this contention, petitioner cites the case of **Wasson v. Trowbridge**, 382 F. 2d 807 (2d Cir. 1967). In the **Wasson** case, the plaintiff had been dismissed from the Merchant Marine Academy. One of his contentions was that members of the panel which disci-

plined him had participated in the investigation. This was contrary to the regulations of the Academy. It is not contrary to the regulations at A & I for a member of the F. A. C. to testify. Further, in the **Wasson** case, supra, the United States Second Circuit Court remanded it to the District Court for a hearing, holding that **Wasson** was entitled to show that members of the panel had had such prior contact that they could be presumed to have been biased.

In the case before this Honorable Court, the Lower Court held a full evidentiary hearing and afforded the petitioner every opportunity to show that the members of the F. A. C. were biased against him. No such showing was made and, to the contrary, the record clearly demonstrates that there was no bias or prejudice on the part of the F. A. C. In 2 Davis, **Administrative Law**, Sec. 13.02, at page 237 and 238 (1958), this question is fully discussed, and Respondents' position upheld:

In **Mackler v. Board of Education of City of Camden**, 16 N. J. 362, 108 A. 2d 854 (1954), the Court held that participation in the prosecution of a case did not disqualify board members who later judged the case in the absence of a showing of malice or ill will or any private interest in the outcome of the case. See, also, **Marcello v. Bonds**, 349 U. S. 302, 75 S. Ct. 757, 99 L. Ed. 1107, **Shaughnessy v. United States**, 349 U. S. 280, 75 S. Ct. 847, 99 L. Ed. 1074; **F. T. C. v. Cement Institute**, 33 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); and **Pangburn v. C. A. B.**, 311 F. 2d 349 (1st Cir. 1962).

Further, Respondents would respectfully refer this Court to the District Judge's findings on this question, as set out on pages 195 and 196 of the joint Appendix.

Finally, this was a question raised in the **Norton** case, supra. The Appeals Court, in that case concluded by saying:

"They were also given a plenary hearing in the District Court with counsel. Their contention of a denial of due process was thereby rendered moot. **Barker v. Hardaway**, 399 F. 2d 638 (4th Cir., 1968)."

CONCLUSION

The decision of the Court of Appeals, affirming the District Court, should be affirmed. The right of school administrators and educators, as well as the rights of other students, should not be trammeled upon as a result of undue zeal in protecting alleged Constitutional rights of an individual student intent on promoting turmoil.

Whether this Court, or any Court, should substitute its judgment on matters of fact and causes of disorder on a college campus, for that of experienced, highly trained school administrators, is the only real question. It is a factual determination as to whether petitioner's conduct was so disruptive, or calculated to be, as to unreasonably interfere with the administration. It is a factual matter as to whether this petitioner violated the Code of Conduct prescribed for all students at the University, as set out in the Student Handbook; and whether he understood what acts were prohibited.

Those best qualified to make these determinations were the Faculty Advisory Committee, composed of well-trained, experienced school administrators, on the scene and exposed to varying degrees of student conduct, and weighing the consequences daily of such acts. The District Court found the action justified. The Court of Appeals affirmed. Respondents respectfully insist that this Court should make a decisive, firm and consistent ruling in support of orderly administration of state supported institutions. By upholding the action of Respondents this will be a result; to hold contrary will result in furthering

disrespect by students of their school administrators and encourage small radical groups of students on our campuses to "educate the educators" through any means at their command, however destructive.

Respectfully submitted

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Certificate of Service

I, Thomas E. Fox, Deputy Attorney General for the State of Tennessee, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ... day of December, 1969, I served copies of the within Brief for the Respondents on the Petitioner, by mailing said copies in duly addressed envelopes, postage paid, to the counsel of record, Honorable Reber F. Boult, Jr., and Honorable Charles Morgan, Jr., Attorneys-at-Law, 5 Forsyth Street, Atlanta, Georgia 30303; Honorable Percy L. Julian, Jr., Attorney-at-Law, 330 East Wilson Street,

Madison, Wisconsin 53703; Honorable Richard Bellman, Attorney-at-Law, 1865 Broadway, New York, New York 10001; and Honorable I. T. Creswell, Jr., Attorney-at-Law, at the Third National Bank Building, Nashville, Tennessee 37201.

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